4th Amendment Applicability:
Private Searches

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Objectives:
1. Restate principle of Private Search doctrine
2. Distinguish between private party and government agent
3. Analyze parameters of computer searches under PSD
   - Determine what constitutes “replication”
   - Assess issues concerning E/P in data

When does 4/A apply?
1. A Government Intrusion
2. Intrusion must invade Protected Interest: REP
   - Actual, subjective E/P; and
   - Society must be prepared to recognize E/P as reasonable.

Katz
I. Basic Principles:
1. Search by priv. party (even if unreasonable) does **not** implicate 4/A.
2. Pvt. s extinguishes REP in object searched.
3. Gvt’s “mere replication” of pvt s NOT a S. under 4/A
4. Subsequent gvt S judged according to it exceeded pvt search.


II. Private actor or Gov’t agent?
- S.Ct test:
  T/C; turns on of Gov’t participation in pvt party’s actions.
- Lower Cts: 2 part test:
  - Did gov’t know of and acquiesce in the intrusive conduct?
  - Purpose of pvt party: assist l.e. or further his own ends?

Indicia of Agency:
- **Gvt.** requested action,
- Offered reward
  U.S. v. Crowley, 285 F.3d553 (7th Cir. 2002).
  - Gvt. Must be actively involved as participant, or
  - Indirectly involved as encourager of the pvt person’s search.
  U.S. v. Leffall, 82 F.3d 343 (10th Cir. 1996)
Private Searchers:

1. Computer technicians
   - 4/A not applicable when performing repair work
   - Agency found: expanding search at request of police
     - Viewing of additional files
     - Copying entire hard drive

2. Computer Hackers

   “Unknownuser” – attached Trojan Horse program to pic he posted to news group frequented by child porn “enthusiasts.”
   - When anyone downloaded pic, Unknownuser got access to their computer,
   - Looked for cp reported to law enforcement.
   
   Case #1:
   Unknownuser was private searcher first time he reported; truly unknown to FBI.
   
   FBI agent thanked him and said:
   “If you want to bring other information forward, I’m available.”
Case #2:
Unknownuser brought more info to FBI.
Government agent?
No.
Agent’s remark “mere expression of gratitude.”
No agency relationship – otherwise any thanks by gov’t transforms any subsequent search into a government Search.

Case #3:
After Case #2, FBI agent told Unknownuser:
Couldn’t ask him to search for more cases:
That would make him a gov’t agent
Information would not be usable, but...
“Feel free to send any additional info you might obtain – you won’t be prosecuted for hacking.”

Strong indication of agency...

Ct: Proverbial wink and nod.
II. Replication of pvt search

**Powerful exception:**
Gov't can replicate *identically* what pvt party did & 4/A does not apply.

- Rationale: Viewing of object eliminates the individual's *expectation of privacy*
in the object.

*Jacobsen*

*FedEx opened damaged package*

*Tube wrapped in newspaper: inside were plastic bags of white powder*

*Repackaged and called fed agents*

*Agent repeated FedEx actions*

*Gvt. action Sunder 4/A ?*

*No.*

*Agent learned nothing that had not previously been learned during pvt/s*

*REP “frustrated” by p/s.*

III. Contextual Analysis

Can pvt party extinguish E/P in objects he did not examine? …

Expansion of prior private search:

Can examination of part of an object destroy E/P as to the whole?

Two Approaches:

1. Police exceed scope by opening container that pvt party did not open

2. Opening previously unopened container ok if police knew w/ “substantial certainty” what they would find inside.
Search?

- Gvt's search of films (by use of projector) violated the 4/A
- It exceeded scope of prior search
- Projection of films breached the remaining, un-frustrated portion of sender's E/P.


Dissent: (Blackmun)

"[The films'] contents were obvious from the 'condition of the package,'...and those contents had been exposed as a result of a purely private search that did not implicate 4/A."

Private Search Doctrine
Search and Seizure of Computers & Digital Evidence for Appellate Judges Oct. 5 -6, 2009
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Airline employee opened unclaimed suitcase – found 5 identical bundles.

Opened 1 – kilo brick of cocaine

Called agent. Agent opened 4 remaining bundles.

Agent’s act of opening previously unopened bundles not improper…

“the presence of cocaine in the exposed bundle spoke volumes as to the contents [of the remaining bundles] – particularly to the trained eye of the officer.”


Computer context:

- Estranged wife removed from home she had shared w/ D. - computer, floppy disks, cds and zip drives
- Wife looked at some cds, some floppies – found cp
- Wife did not examine ZIP drives
- Turned all over to police – who viewed everything
Ct. analyzed scope under *Jacobsen*

1. What about disks NOT viewed by Wife?
   
   Q: Could cops determine with *substantial certainty* all disks contained cp based on:
   
   - Statement of pvt searchers
   - Replication of pvt search
   - Their experience and expertise
   
   **NO**

2. What about viewing of additional files on same disks wife viewed? Search?
   
   - E/P in container already compromised when opened and examined by pvt party
   - Gov’t can view materials *more thoroughly* than did the pvt party
   - (can view *more materials* w/in the closed container than did the pvt party.)
   
   *Ct. considered the disk to be the container.*

   *Runyan, 5th Cir. 2001*

- Repairman finds 2 computer folders – both contain files with names suggestive of cp
- He opens *some* files from each folder, finds cp, calls police
- Police open same files (+) additional files
As to same files:

Did police learn anything NOT already learned by repairman? No- not a search under 4/A.

As to Additional files:

- Not Search w/in 4/A;
- No E/P remained in folders;
- Police knew w/ substantial certainty that there was additional cp in folders:
  - Statements of pvt searchers
  - Replication of pvt s/
  - expertise

  Emerson, (N.Y. Sup. Ct. 2003)

Hypothetical -
Computer tech opens "kid sex" folder:

files:
- littlegirls.under16.sexualintercourse
- littlegirls.under15.sexualintercourse
- littlegirls.under14.sexualintercourse
- littlegirls.under13.sexualintercourse
- littlegirls.under12.sexualintercourse
- littlegirls.under11.sexualintercourse
- littlegirls.under10.sexualintercourse

Tech opens 16, 15, 14 finds CP - closes files & calls police.
Police open 16, 15, 14….

littlegirls.under16.sexualintercourse
littlegirls.under15.sexualintercourse
littlegirls.under14.sexualintercourse
littlegirls.under13.sexualintercourse
littlegirls.under12.sexualintercourse
littlegirls.under11.sexualintercourse
littlegirls.under10.sexualintercourse

Can police open files 13 – 10?
Do they exceed scope of private search by opening more computer files than the tech?

To what does E/P attach?
What is the relevant Container?
Computer? Folder? File? Image?

What is most cautious course of action?

Thank you!
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